84-1561

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No.

IN THE

Supreme Court of the United States

JANUARY TERM, 1985

S/S "LAKE ANJA", her engines, tackle, boilers, etc., EUROLAKES TANKER LINE, A/S BLYSTAD SHIPPING LINE, ARNE BLYSTAD, A/S OSLO, BLYSTAD SHIPPING INC., STANFORD BLYSTAD SHIPPING, INC., OSLO & A/S SONGA,

Petitioners,

– against –

M. GOLODETZ EXPORT CORPORATION and N.V. ALGEMENE VERZEKERINGSMIJ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Second Circuit has erred in reading *Schnell v. The Vallescura*, 293 U.S. 306, 55 S.Ct. 194 (1975) as rejecting the application of the doctrine of proportionate fault to maritime suits involving damage to cargo?

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Jurisdiction

The judgment of the Court of Appeals was entered on Janaury 2, 1985. This petition was filed within 90 days of that date. Petitioners invoke this Court's jursidiction pursuant to 28 U.S. C. §1254 (1).

STATEMENT OF THE CASE

This case was brought before the Federal District Court for the Southern District of New York as an Admiralty or Maritime case.

The cause of action arose from alleged damage caused to a shipment of liquid tallow (Inedible Bleachable Fancy Tallow) carried aboard Petitioner's vessel, s/s LAKE ANJA from Louisiana to Dunkirk, France, in January, 1980. The seller and buyer had agreed privately to specifications providing that the shipment could be rejected at destination if FFA (Free Fatty Acid) exceeded 5.00% or the R & B (Refined and Bleached Color) was above 1.5 Red. These specifications were not made known to the carrier and were not binding upon it.

When shipped, tallow is maintained in a liquid state by heating. It will deteriorate with the passage of time alone, and the higher the temperature the faster it will deteriorate. The expert witnesses testified, and the judge found, that damage to tallow is a function of "heat plus time".

While the bill of lading contained no stipulations concerning temperatures for loading, carriage or discharge, a mate was handed copies of standard written instructions long used in the trade. The LAKE ANJA however, was a single skin (not double bottom) ship and its officers believed from past experience that to carry tallow safely on such a vessel in cold winter waters, higher temperatures were required to keep the tallow from congealing against the inside of the hull, and they freely admitted that the tallow had been carried at higher temperatures than those set forth in the instructions. However, they testified—and the testimony was supported by experts—that the higher temperatures they adopted had never caused claims and would not damage tallow on a normal voyage.

However, the voyage of the LAKE ANJA was not normal. On the 13th day of what would have been a 15-day crossing to Dunkirk, the vessel was in a collision. The accident ripped a hole in her portside some seven feet below the water line. The cargo was not damaged or lost in the collision, but the vessel put into Rotterdam for necessary repairs, which delayed her trip to Dunkirk by 19 days. Several shipments of tallow destined for

Rotterdam were discharged there in sound condition, *although they also had been carried at the higher temperatures.* The conclusion was inescapable that had the vessel arrived at Dunkirk on time, the shipments in suit would also have been delivered in sound condition.

Although the carrier argued before the trial court that it should not be bound by the heating instructions which were not part of the bill of lading or by the narrow specifications agreed upon privately by the seller and shipper, the judge found that the carrier was bound by the instructions because the mate acknowledged their delivery to him. He also held the cargo was "damaged" because it did not meet the private specifications, although he did find it was merchantable and could have been sold on the prevailing market price.

The Court of Appeals upheld the trial court's finding that the carrier should have followed the shipper's temperature instructions, although the appeals court based its holding on the ground that the instructions were customary in the trade. It also agreed with the trial court that the ship's officers were "negligent" in maintaining the higher temperatures during the extended period of 19 days after the collision (despite testimony that while the single-skin vessel lay motionless in port, higher temperatures were all the more important to keep the cargo from congealing and causing even greater loss).

In order to simplfy the issue presented, this petition does not challenge the findings that it was bound by the instructions or by the specifications stipulated in the private contract between the seller and the buyer.

The trial judge found, and the Court of Appeals agreed, that the higher temperatures maintained during the 19-day delay contributed to the loss. While the Petitioner also disagrees with this finding, it recognizes that it is a finding of fact by the trial judge that cannot be challenged as "clearly erroneous".

However, the trial judge also found *as a fact* that the 19-day delay, during which the cargo had to be kept in a heated liquid state, also contributed to the loss. The Court of Appeals did not—and, it is submitted, could not—determine that this finding of

fact was "clearly erroneous". *See McCallister v. U.S.A.*, 348 U.S. 19, 20 (1954). Instead, it reversed the trier of facts by finding *as a matter of law* that the judge could not apportion liability according to degree of fault in a cargo case. The Court of Appeals cited *Schnell v. The Vallescura*, 293 U.S. 296 55 S.Ct. 194 (1934), a decision which predated the Carriage of Goods by Sea Act, 46 U.S.C. §§1300 et. seq. (1936), as its authority for this surprising proposition.

THE WRIT OF CERTIORARI SHOULD BE GRANTED FOR THE FOLLOWING REASONS:

1. The Second Circuit's reading of the Vallescura disrupts uniformity of maritime law by prohibiting application of the proportionate fault rule in cargo cases. It conflicts with the spirit of *Reliable Transfer* and toughens an already harsh rule.

This petition for *certiorari* presents the single question of whether the Second Circuit has erred in reading *Schnell v. The Vallescura*, 293 U.S. 306, 55 S.Ct. 194 (1975) as rejecting the application of the doctrine of proportionate fault to maritime suits involving damage to cargo.

In 1975 in *United States v. Reliable Transfer Co. Inc.*, 421 U.S. 397, 95 S.Ct. 1708 (1975), the Supreme Court reversed the Second Circuit's application of the rule of divided damages in a collision case and adopted, for the sake of uniformity and for the sake of "just and equitable" allocation of damages in maritime law, the rule of damages in proportionate to fault.

In 1977, in *Vana Trading Co. Inc. v. S.S. "Mette Skou"*, 556 F.2d 100, *cert. denied* 434 U.S. 892 (1977) the Second Circuit declined to apply to maritime cargo suits the doctrine of proportionate fault which had been recently adopted by the Supreme Court. In a footnote the Circuit Court stated, "We declined a similar invitation in *Reliable Transfer . . . for reasons equally applicable in the instant case.*" (Emphasis added.) 556 F.2d at 102.

In the case at Bar, the Second Circuit reversed the trial judge's findings that 50% of the loss had been caused by the carrier's fault (overheating of the cargo of tallow) and 50% had been caused without the carrier's fault (a delay due to a collision

which doubled the length of the voyage). After hearing a battery of experts testify, the trial judge had come to the conclusion that all the damages found were a "function of time and temperature" and the result of two concurrent causes. Because the excusable delay had approximately doubled the length of the voyage, the trial judge found that the carrier was liable for 50% of the damages. Commenting on this finding, the Second Circuit said:

> "Although such an attempt to connect liability to blame may, at first glance, appear to achieve substantial justice, this approach is supported neither by the cases nor the policy considerations that buttress the seemingly harsh rule of the *Vallescura*. In *Vana Trading, supra*, 556 F.2d at 106, we did suggest at one point that apportionment of loss was inappropriate because the district court 'was unable to make a finding as to the allocable percentage of the degree of *fault*' (emphasis supplied). That comment, however, must be read as something less than authoritative, for we explicidly 'decline[d] the invitation . . . to apply to cargo suits the doctrine of proportional fault.' " (A-17-18).

Thus, while the trial court had made findings of facts, after hearing all the evidence of the experts, that the loss had occurred during the time of the extended voyage after the collision, and that half of the damage had been caused by the temperatures at which the carrier had chosen to carry the tallow and half had been caused by the double length of the voyage, the Second Circuit found *as a matter of law*, relying on its reading of the *Vallescura*, that in cargo suits the trial court had to ascertain the apportionment of damages rather than the apportionment of fault.

The Second Circuit said:

> "A rule that requires an ascertainable apportionment of damages, as opposed to apportionment of fault, may occasionally lay at the feet of an innocent carrier, a loss he could not prevent and for which he bears no blame merely because the law, in pursuance of a wise policy, casts upon

> him the burden of showing facts relieving him from liability'. The *Vallescura, supra*, 293 U.S. at 307.' (A-18).

Thus, rather than clarifying its peculiar reading of the *Vallescura*, the court only added confusion to this area of maritime law by creating a "distinction without a difference".

As more cargo suits are filed in the federal courts than any other kind of maritime litigation, a reading of the *Vallescura* which promotes an "all or nothing" situation, will only prolong the disposition of such suits by making those settlements all the more difficult whenever the loss results both from the fault of the carrier and one of the 18 causes for which the carrier is not liable under the U.S. Carriage of Goods By Sea Act, 46 U.S.C. §1304(1) and 1304(2)(a) to (q) (1936).

All that the *Vallescura* did was extend to maritime cases the long established common law rule that the circumstances upon which a carrier may rely to relieve himself of liability for damage to property caused while in his possession are peculiarly within his knowledge and usually unknown to the owner, and that therefore the burden of separating two causes of damage is placed upon him by the law. If the carrier cannot separate the damage caused by his fault, then the law casts all the loss upon him.

The *Vallescura* rule which casts upon the maritime carrier the burden of proving that all or part of the loss was not due to its fault, by bringing it within one of the exceptions to liability carved out by the law, was an appendage to, and not a replacement of, the long established rule of proportional fault applicable in all maritime cases, except collision suits. Maritime law, since *Reliable Transfer, supra*, now uniformily relates comparative fault to comparative damages, the latter always relfecting the former (except in the special *Vallescura* situation where a carrier is unable to bring any part of the loss within an excepted cause by explaining what happened while the goods were in his possession).

The distinction which the Second Circuit decision tries to create in this case between apportionment of damages and apportionment of fault in cargo cases creates a disharmony in

maritime law which clashes with the uniformity sought by *Reliable Transfer*. If a jury could always apportion fault in personal injury cases, and a judge can now also do the same in collision cases, there is no reason why cargo cases should follow a different rule and thus destroy the uniformity courts have traditionally sought in maritime law.

In *Vana Trading, supra,* the Second Circuit after starting out its decision by declining the "invitation . . . to apply to cargo case suits the doctrine of proportional fault", 556 F.2d at 102, went on to make the following statement in the same case:

> "Indeed, this area [cargo] has been governed for some forty years by a rule which does allow for *apportionment according to degree of fault,* although an occasional harsh result may arise as when the carrier is unable to sustain its final burden of proving *the relative degree of fault*"! (Emphasis added). Id. at 106.

It correctly found in that case that the *Vallescura* rule applied because, "The trial court was unable to make a finding as to the *allocable percentages of the degree of fault* . . ." Id. at 106.

In this case, the experienced trial judge who had called counsel into Chambers, just before deciding the case from the bench, to point out to them the applicability of the *Vana Trading* case, *was* able to make a finding as to the degree of carrier's fault and he accordingly applied that degree to the apportionment of damages. That finding that overheating had caused half the damage and delay had caused the other half should not have been disturbed unless clearly erroneous. Instead, the Second Circuit ruled as a matter of law that the judge had erred in allocating the loss by reference to the degree of fault. By applying its curious reading of the *Vallescura* to this case, it undermined the able trial judge's attempt to do substantial justice in a difficult case "arising from a rather byzantine factual setting" and made the carrier another victim of "the seemingly harsh rule of the Vallescura". *M. Golodetz v. Lake Anja,* F.2d , 1985 A.M.C. 891, 893, 903 (2d Cir. 1985) (A-3, A-18).

The *Vallescura* was decided before the passage of the Carriage of Goods by Sea Act in 1936, and while it is true that the burden

of proof rule it laid down has been followed, albeit with frequent harsh results, even after 1936, it is at least questionable whether the rule should have survived COGSA, for the Act contains its own legislated burdens of proof. For example, the burden of proving excercise of due diligence to make a vessel seaworthy is placed on the carrier, 46 U.S.C. 1304(1), as is the burden of proving that the loss was due to "any other cause arising without the fault of the actual fault and privity of the carrier . . ." 46 U.S.C. 1304(2)(q). One would think that if Congress wanted the special rule of the *Vallescura* carried over into COGSA, it would have included the rule in COGSA's burden-of-proof scheme.

2. The Second Circuit Decision Prevents the reaching of just and equitable solutions in cargo cases by placing upon carriers an impossible burden of proof. This will encourage more litigation in this most litigious area of mairtime law. The Vallescura should be set back on course.

The judge heard *plaintiff's* expert testify that "The tallow is affected by temperature and time" and one cannot say "at what temperature" the R & B will be damaged, since "the damage to tallow will be done, as I mentioned earlier, as a function of time and temperatures." The FFA can be affected even at lower temperatures than those contained in the instructions, "Well, it's again a function of temperature and time, as to how long you are going to keep it". The witness agreed that even at the instructed temperatures, the FFA will go up if cargo has to be carried two or three weeks and that it was just a question of time. Even in a solid state at ambient temperatures, time alone will cause the cargo to change. The Carrier's expert explained that tallow contains enzymes, inherent in the crude material, which will cause it to change over a period of time. Enzymes are present in all tallow which is manufactured. "It is inherent in the cargo." When tallow is in a heated state, the degradation goes on and on "because of the biological nature of the substance". No one testified that heat was more important than time or time more important than heat.

Accordingly, the trial judge found *as a fact* that the tallow was damaged by the combination of higher temperatures and longer

time and, based on all he heard in the difficult case, he attributed half the damage to the overheating and half to the extra 19-day delay for which the carrier had proven no fault under the Carriage of Goods by Sea Act §1304(2)(q).

The Court of Appeals reversed the trial judge *as a matter of law*, stating:

> "We disagree, for the cases suggest that, in the setting, the delay cannot be said to be a cause that relieves the carrier of liability for the cargo damage that occurred during the delay . . . The district court seems to have attempted to allocate loss by reference to degree of fault, for there was no evidence introduced regarding *which tanks of tallow were damaged by time, and which by temperature.* In fact, Judge Brieant found that all damages were a 'function of time and temperature'. Although such an attempt to connect liability to blame, may, at first glance, appear to achieve substantial justice, this approach is supported neither by the cases nor the policy considerations that buttress the seemingly harsh rule of *The Vallescura.*" (Emphasis added)

The reading of the *Vallescura* by the Second Circuit transforms the rule into a new rule that any contributory negligence by the carrier is fatal unless it can physically separate different types of damage. It would create a truly "impossible burden" of separating damages "tank by tank", or it would require a carrier to show which ton of tallow was damaged by heat and which ton was damaged by delay. It would be like asking a jury to determine which part of a back was injured by the grease on the deck and which part by the seaman's failure to watch where he was going.

The rule of the *Vallescura* can occasionally lead to harsh results. As read by the Second Circuit, the consequences became even tougher, as the burden of physical separation of types of damage presents on all but impossible burden to overcome. This litigation, for example, was largely a dispute about the chemical properties of tallow, a product which fits the classical definition of "inherent vice" since it was admitted that time alone would cause it to degenerate. Although the shipper/manufacturer had

far superior knowledge of its chemistry, the carrier was forced to shoulder the burden of proving how time and temperatures interacted on the FFA and R & B. Harsh rules should be narrowly construed.

This court should set the *Vallescura* back on course by making clear that all that it stands for is that the carrier has the burden of showing to what degree an excepted peril contributed to the loss, or to put it another way, to what extent his fault did not contribute to the loss. The latter statement would better harmonize with COGSA, §1304(2)(q).

It would also be salutory to point out that the trial judge is not a computer and that he is not bound to make an exact apportionment of the degree of fault. It is enough if he can fairly measure the comparative degree of fault.

3. The cases cited by the Court of Appeals are clearly distinguishable and do not support its reading of the *Vallescura*. The Supreme Court has not applied the *Vallescura* to COGSA cases.

An examination of the three cases cited by the Circuit Court as following the *Vallescura* are clearly distinguishable.

In *Vana Trading v. S.S. Mette Skou*, 556 F.2d 100 *cert. denied*, 434 U.S. 892 (1977) the parties agreed and the trial court concurred that an exact apportionment of degree of fault could not be made on that cargo case. The trial judge tried to apply the *Reliable Transfer* rule of collision law that damages may be divided equally "when it is not possible fairly to measure the comparative degree of fault", and the Court of Appeals correctly reversed and applied the *Vallescura* rule. But in the case at bar, the trial judge called counsel's attention to *Vana Trading* and then made an affirmative finding, based on his understanding of the expert's testimony that the carrier's degree of fault was 50%. On this finding of fact, plaintiff was not entitled to a trial *de novo* on appeal.

In the *Sabine Howaldt*, 437 F.2d 580 (2d Cir. 1977), the Second Circuit did not apply the *Vallescura* rule where the perils of the sea defense was proven by the carrier, and it never

addressed the question of whether degree of fault should be the standard for deciding the case. 437 F.2d at 588-9.

In *Lekas & Drivas Inc. v. Goulandris*, 306 F.2d 426 (2d Cir. 1962), cited by the *Sabine Howaldt* court, this Second Circuit distinguished the *Vallescura*, holding that it was not "directly on point", 306 F.2d at 431, and that the *Vallescura* burdens did not apply.

It is respectfully submitted that there is no policy reason which justifies the admittedly harsh burden this court has imposed in this case, as opposed to the "substantial justice" which was done by the trial court (Opinion, Page 24), and that it is time that as much uniformity as possible was achieved among the major areas of Admiralty Law.

When correctly read, the *Vallescura* distinguishes cargo law from other areas of maritime law only in the very narrow situation where "it is not possible fairly to measure the comparative degree of fault". In that situation alone, the cargo carrier must bear all the loss (because of his peculiar knowledge position) whereas in other areas where both parties have equal access to evidence, the damages may be divided equally. *See Reliable Transfer*, supra.

The Circuit Court also cited *The Saturnia*, 226 F.2d 147 (2d Cir. 1955) for the proposition that "the appropriate question becomes whether proper heating over the course of the *extended* voyage would have caused the cargo to exceed its contractual specifications. Absent a finding in the affirmative, we must reverse the district court's determination that the carrier was absolved of liability for damages occurring during the delay."

In the *Saturnia* case, which was discussed in the trial briefs, the evidence was that the chestnuts would not have decayed if properly ventilated despite the delay caused by the strike. The court found that the carrier had failed to show "why, in spite of any delay, the cargo could not have been given the required ventilation or other steps taken to eliminate or minimize the loss." 226 F.2d 147 at 150. The Court found the chestnuts became moldy because of heat and moisture, rather than the delay. The trial judge in the case at bar, however, was convinced

from testimony given by experts for both sides, that the particular damage suffered by the tallow was a "function of time and temperature". Time alone will cause tallow to deteriorate, even when carried at temperatures requested by the shipper. Increased temperatures will cause it to deteriorate faster. The evidence was clear that the increased temperatures utilized by the carrier did not damage the cargo during the normal voyage, for all the other shipments of tallow whose discharge was not delayed by the collision, but which had been carried at similar higher temperatures, were delivered in sound condition. The shipments in suit, however, remained on board the vessel for approximately twice the time of the normal voyage while the vessel underwent repairs. Thus, the trial judge was satisfied that the increased heat had contributed to the damage only during the extended voyage, and that the delay which doubled the length of the voyage was not the carrier's fault. Since there was no proof that in the "function of time and temperature" either factor outweighed the other, he reached an equitable solution by attributing one half of the damage sustained by the tallow to the temperatures and one half to the delay.

Courts of admiralty have traditionally been encouraged to reach equitable results. It is not infrequent that damage to cargo is the result of more than one cause, e.g., inherent vice and improper stowage, insufficient packaging and rough handling, overheating and unavoidable delay. In admiralty suits, witnesses' credibility and persuasiveness and weight of their testimony are questions for the trial judge as fact-finding tribunal, and his sense of justice in apportioning fault and damages should not be disturbed unless clearly erroneous.

The *Vallescura* rule should be reviewed and properly applied only to pre-COGSA cases, when the ocean common carrier, along with the other common carriers, was considered "a special type of bailee who had assumed the obligation of an insurer." See *Commercial Molasses Corp. v. New York T.B. Corp.*, 314 U.S. 104, 109 (1941). COGSA ended the rule of the ocean carriers as an insurer of the goods, except in cases of "unreasonable deviation". Gilmore & Black, *The Law of Admiralty*, 2d Ed. 1975, p. 180. The only other carrier case in which this Court has

cited the *Vallescura* is a railroad case, *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 84 S.Ct. 1142 (1964).

CONCLUSION

THE SINGLE ISSUE RAISED IN THIS PETITION DESERVES THE ATTENTION OF THIS COURT AS IT IS CERTAIN TO LEAD TO MORE CONTROVERSY IN CARGO LITIGATION, AN AREA OF LAW WHICH GENERATES MORE SUITS IN THE FEDERAL COURTS THAN ANY OTHER KIND OF MARITIME CONTROVERSY.

RESPECTFULLY SUBMITTED,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 434 — August Term, 1984

(Argued: November 9, 1984 Decided: January 2, 1985)

Docket Nos. 84-7390, 84-7392

M. GOLODETZ EXPORT CORP., and
ALGEMENE VERZEKERINGSMIJ MERCATOR,
Plaintiffs-Appellants-Cross-Appellees,

—against—

S/S LAKE ANJA, her Engines, tackle, boilers, etc., EUROLAKES TANKER LINE A/S, BLYSTAD SHIPPING INC., ARNE BLYSTAD A/S OSLO, BLYSTAD SHIPPING INC., OSLO, A/S SONGA,
Defendants-Appellees-Cross-Appellants.

Before:

KAUFMAN, OAKES, and NEWMAN, *Circuit Judges.*

Plaintiffs appeal, and defendants cross-appeal, from a final judgment of the United States District Court for the Southern District of New York (Brieant, *Judge*), awarding Golodetz and Mercator $183,128 in damages in an action brought pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 *et seq.*

Affirmed in part, reversed in part and remanded.

DAVID L. MAZAROLI, Yorkston W. Grist, P.C., New York, New York, *for Plaintiffs-Appellants-Cross-Appellees.*

M.E. DEORCHIS, DeOrchis & Partners, New York, New York (Manuel R. Llorca, Diane M. Rollo, *of counsel*) *for Defendants-Appellees-Cross-Appellants.*

KAUFMAN, *Circuit Judge:*

M. Golodetz Export Corp., a seller and shipper of fats and oils, brought this action in the district court against the S/S Lake Anja *in rem* and her owners and charterers *in personam*, pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 *et seq.* (1982). Golodetz claimed its cargo was loaded aboard ship in good condition and offloaded in a damaged state. The ocean carrier responded that any damage was the direct result of a collision at sea for which the crew of the S/S Lake Anja was not responsible, and thus fell within the "q clause" exception to COGSA liability. *See id.* § 1304(2)(q).

The district judge, in an unreported decision, found that the carrier intentionally disregarded heating instructions delivered by the shipper and that the resulting overheating was a concurrent cause of the damage to the cargo. He found that the delay occasioned by the collision was also a concurrent cause of the damage, and that such cause fell within COGSA's "q clause." Because the delay approximately doubled the length of the voyage, the court below found the carrier liable for one-half of the total damages.

In quantifying damages, Judge Brieant held that Golodetz had failed to mitigate its losses, and therefore awarded it one half of the damages it would have sustained had it resold the cargo as soon as it learned of the rejection by a non-party consignee—a total of $183,128.

On appeal, Golodetz argues that the trial judge erroneously apportioned loss between excepted and unexcepted COGSA causes on the basis of fault and, in any event, that the collision delay was not a concurrent cause of the damage. It also urges that it should not be held to have failed to mitigate its damages. The ocean carrier cross-appeals, asserting that it was never bound by the heating instructions.

We affirm the district court's rulings that the carrier was bound by the heating instructions, and that Golodetz failed to mitigate its losses. We reverse, however, the apportionment of damages between shipper and carrier, because such a division of losses is not supported by the relevant case law.

As always, our discussion of the pertinent legal points is meaningful only by reference to the facts of the case before us. Because this appeal arises from a rather byzantine factual setting, we find it necessary to set it forth in some detail.

I. Background

A. *Tallow*

Tallow is animal fat used in the manufacture of soap and candles, and is an ingredient in cattle feed. Generally, it is produced in meat-packing or rendering plants.

The types and grades of tallow vary, and the characteristics of a given shipment greatly affect its value. Edible tallow, for example, is fat rendered from the edible parts of an animal, and is considerably more costly than the inedible commodity. Inedible tallow—the type shipped aboard the S/S Lake Anja—is also graded and priced according to certain uniform specifications.

Of particular interest in this case are two such specifications used in the grading of tallow—"FFA" and "R+B color." Tallow is a compound of fatty acids and glycerine. FFA (Free Fatty Acid) provides a measure of how much of the fatty acids has broken free of the triglyceride molecule. In essence, FFA—described as a percentage—refers to the purity of the tallow. The higher the FFA, the less homogenous (and less valuable) the commodity.

R+B color (Refined and Bleached color) measures the bleachability of the tallow. To derive that figure, a sample is refined and bleached in a laboratory, and is then compared visually to a standardized color chart. The amount of red pigmentation in the sample (i.e. the tallow's darkness) is expressed as a number, which increases as the color saturation becomes greater. Accordingly, a batch of tallow with an R&B color of 1.5 Red, for example, is more valuable than a batch measuring 2.5 Red.

Finally, it is worth noting that tallow has a relatively low melting point—somewhere between 125° and 130° Fahrenheit. When shipped, it is maintained in a liquid or semi-liquid state. When transferred—from railway tank cars to shore tanks, for example, or from shore tanks to a ship—it is heated to a liquid and pumped

through pipes. This constant heating, cooling and reheating is critical to the proper loading, storage and discharge of a cargo of tallow. But, as shall be seen, a few too many degrees may, over the course of time, transform 4,500 tons of Bleachable Fancy Tallow into nine million pounds of animal fat.

B. *Onloading*

On January 14, 1980, the S/S Lake Anja took on 1,018 tons of Inedible Bleachable Fancy Tallow at Reserve, Louisiana, a port on the Mississippi River near New Orleans. The shipment had been purchased "FOB vessel" by the M. Golodetz Export Corp. (which will be referred to as "Golodetz" or simply the "shipper"), a New York firm that trades and exports animal fats and vegetable oils. In turn, Golodetz consigned the shipment to its customer, Ch. Daudruy Van Cauwenbershe et Fils ("Daudruy") of Dunkirk, France, in fulfillment of an agreement previously entered into between the two parties. The Golodetz-Daudruy contract provided that the tallow was to be delivered at Dunkirk. Daudruy was to pay $605.00 per metric ton, with 90% of the purchase price payable upon presentation of the bill of lading and the balance due "after determination of delivered weight and quality." It is to be noted that the Uniform Export Contract entered into by the parties set forth precise quality standards for the tallow. Specifically, it provided that Daudruy could reject the shipment if the FFA exceeded 5.00% [1] or the R&B color was above 1.5.

[1] The contract provided for a maximum FFA of 4.00%, with a cost allowance for any increase above 4.00% but below 5.00%. Only if the FFA reached or exceeded 5.00% however, would the shipment be deemed rejectable.

Golodetz commissioned an independent laboratory to draw and scientifically analyze a sample of the tallow that had been pumped aboard the S/S Lake Anja at Reserve. The FFA was reported to be 4.00% and the R&B color 0.7 Red.

While the S/S Lake Anja was still at Reserve, Golodetz forwarded a one-page letter containing detailed heating instructions to the vessel. That document (reprinted in the margin)[2] provided that the cargo should

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[2] The full text of the document is as follows:

GENTLEMEN:

Please find below heating instructions to be followed during the carriage and discharge of the above captioned parcel. These instructions shall apply to each individual ship's tank.

1.) Ship's coils must be completely covered by the cargo on completion of loading.

2.) Heating shall be effected by means of hot water or, if this is impracticable, by means of low pressure steam.

3.) During the voyage the cargo must be kept at a temperature of minimum 108F (42.2c) to maximum 118F (47.8c).

4.) In sufficient time prior to arrival at port of discharge, heat should be applied steadily to ensure that the temperature of the cargo at time of discharge should not be less than 129F (53.9) and not more than 136F (57.8). The cargo should be maintained within this range of temperature throughout the discharge.

5.) The increase in temperature of the cargo during a period of 24 hours *must never exceed 5F.*

6.) In order to avoid any damage to the quality of the cargo, it is essential that heat should be applied gradually. A sudden increase in the temperature must be avoided as it will almost certainly result in damage to the cargo.

7.) At no stage of the handling must the temperature of the cargo exceed 136F (57.8c).

8.) Top and bottom temperatures should be maintained as equal as possible.

9.) The temperatures referred to above are the average of top, middle, and bottom readings. The top reading will be taken at about one foot below the surface of the cargo. The bottom reading will be taken:

A.) In tanks which have coils on the floor, at one foot above the level of the coils.

[Footnote continued on following page]

not be heated above 118° Fahrenheit during the voyage, but could be raised to a temperature not to exceed 136° Fahrenheit in preparation for discharge. It also stated that the increase in temperature should never exceed 5° Fahrenheit in any twenty-four hour period and daily temperature readings should be taken and recorded. At the bottom of the instruction sheet, below the legend "please acknowledge receipt by signature below," the first mate signed his name "for [the] master of the vessel."

On January 19, the procedure described above was repeated at Avondale, Louisiana, a nearby port on the Mississippi River. 1,019.089 tons of tallow were loaded aboard the S/S Lake Anja. The cargo had been purchased "FOB vessel" by Golodetz and consigned to Daudruy pursuant to the same Uniform Export Contract. Samples were drawn and tested. The FFA was put at 3.47% and the R&B color at 1.0 Red. Heating instructions identical to those used at Reserve were transmitted to and acknowledged by the master of the ship.

[Footnote continued from previous page]

B.) In tanks which have side coils but no floor coils, at a point about two feet from the bottom of the tank and about one foot from each of the side coils.

10.) The temperatures indicated in (4) and (7) above are applicable under normal conditions prevailing at port of discharge. In the event of abnormal conditions (such as extremely low atmospheric or water temperatures) receivers of the cargo (but no one else) may vary the temperatures stated, by giving wireless or written notification to the captain or shipowner. Details of any amendments must be duly recorded and advised to shippers or their representatives.

Please acknowledge receipt by signature below.

Daily temperature readings of the cargo should be recorded on the attached chart which is to be signed by either the captain or the chief officer of the vessel and to be turned over to the recivers of the cargo upon arrival.

Two days later, a third and final delivery of tallow, comprising 2,490.982 tons, was loaded aboard the ship. This amount was already owned by Golodetz and stored in its warehouse at Harvey, Louisiana. It, too, was consigned to Daudruy and, again, the bill of lading was delivered to and signed by the ship's master together with a copy of the heating instructions already described. The tallow pumped aboard ship at Harvey showed an FFA of 3.13% and an R&B color of 0.8 Red.

By the end of the day on January 21, 1980, the S/S Lake Anja had in its tanks a total of 4,528.979 metric tons of Inedible Bleachable Fancy Tallow owned by Golodetz and consigned to a purchaser in France, where the ship was destined.[3]

C. *The Voyage*

The S/S Lake Anja set sail on January 24, 1980, and was due to arrive in Dunkirk, France on February 8. The first thirteen days of what was to have been a fifteen-day crossing passed uneventfully. On the 7th day of February, however, as the ship was entering the English Channel, it collided with another vessel, the "Maryious City." The accident ripped a hole in the Lake Anja's hull on the port side some seven feet below the water line, but none of the Golodetz cargo was lost or damaged as an immediate result of the accident. The collision did, however, cause the vessel to detour to Rotterdam, where she discharged her Rotterdam cargo and put in for repairs for a period of nineteen days. On

[3] The Golodetz cargo at issue in this appeal filled three of the S/S Lake Anja's thirty tanks. The remaining twenty-seven were filled with other cargoes of tallow (some of them consigned by Golodetz), which were bound for Rotterdam.

February 26, having been restored to seaworthy condition, the Lake Anja made its way from Rotterdam to Dunkirk, a trip that lasted some eight to ten hours.

D. *Discharge and Rejection*

Sometime late in the day on February 26, 1980, the Golodetz cargo was pumped into barges and transferred to Daudruy's shore tanks in the port of Dunkirk. As provided in the Golodetz-Daudruy contract, 90% of the purchase price was paid upon presentation of the bills of lading.

The consignee, Daudruy, had samples taken of the off-loaded tallow, which were analyzed at a commercial laboratory in Paris. One sample showed an FFA of 5.80%. R&B color ranged from 1.6 to 3.5 Red—well beyond the permissible range set forth in the contract. Accordingly on February 27th, Daudruy rejected the cargo by sending Golodetz the following cable:

> The checkup by our laboratory of the above-captioned goods at present in the course of inspection shows a quality not in accord with the contractual characteristics. We are compelled forthwith to refuse this merchandise which we are having stored at your charge, risk and peril while awaiting the confirmation of our results by official laboratory on samples taken in presence of your surveyors.

Golodetz arranged for additional analyses of the tallow to be conducted by another approved laboratory. It confirmed that the cargo did not meet the specifications set forth in the contract.

At that point, Golodetz invoked the arbitration provision of its agreement with Daudruy, and sought to force

the consignee to accept the cargo and remit the 10% of the purchase price as yet unpaid. Daudruy cross-claimed before the arbitration panel, seeking return of the 90% of the price already paid. In July of 1981, almost seventeen months later, the arbitrators filed their decision and award. They found that the cargo was, in fact, nonconforming and the rejection was therefore permissible. Daudruy was awarded a total of $2,241,029.07 (the amount it had already paid out) and ordered to return to Golodetz all documents of title to the tallow. Ultimately, the once Inedible Fancy Bleachable Tallow, now not so fancy, somewhat aged and sitting congealed in the Dunkirk tanks, was sold to Daudruy at a "salvage" price of $435.00 per ton, down from the $605.00 per ton price specified in the original contract. The resulting difference amounted to more than three-quarters of a million dollars.

E. *Proceedings in the District Court*

Having sought and failed to compel acceptance of the cargo before a panel of arbitrators, Golodetz turned its attention to the ocean carrier in an attempt to shift the loss. On April 6, 1983, Golodetz and N.V. Algemene Verzekeringsmij Mercator ("Mercator"), the lead underwriter for the consortium that had insured the cargo, filed an action in the Southern District of New York against the S/S Lake Anja *in rem* and against its owners and charterers *in personam*. The suit, brought pursuant to the Carriage of Goods by Sea Act, charged that the damage to the cargo resulted from an unexcepted COGSA cause. Plaintiffs below sought to recover the difference between the contract price and eventual sale price plus incidental damages.

The action was tried before Judge Brieant, sitting without a jury, on three consecutive days in March of

1984. At the conclusion of the trial, the judge set forth his findings of fact and conclusions of law from the bench.

Specifically, the able trial judge, in dealing with this difficult case, found that the shipper had met its burden of showing that the tallow was loaded aboard the S/S Lake Anja in a condition that conformed to the Golodetz-Daudruy contract, and that the cargo failed to meet those specifications when it was discharged at Dunkirk. Although the carrier was not a party to that agreement, and thus could not be bound by its terms, Judge Brieant concluded as a matter of law that the special heating instructions "were actually delivered to and acknowledged by the master of the vessel," and so "became a part of the contract of affreightment by which the defendant was bound." He found that the crew of the officers of the vessel "willfully and intentionally" ignored the instructions.

Turning to the collision and its aftermath, the court found that the accident was in no way attributable to the fault or negligence of the agents or servants of the carrier. Moreover, the judge found that the delay of 19 days occasioned by the collision was not unreasonable.

At this point, the findings seem to become somewhat confusing. The judge stated that the damage to the tallow was a function of "heat plus time." Overheating, as has been noted, was attributed to the carrier. Time, on the other hand, was not. Judge Brieant ruled that the intentional overheating of the cargo and the delay caused by the collision were concurrent causes of the damage. Because the detour to Rotterdam approximately doubled the length of the voyage, he attributed one-half of the loss to each cause. Accordingly, he found that the carrier was liable for 50% of the damages.

Finally, the judge considered the question of quantifying the correct measure of damages. After setting forth the law that a shipper may not recover damages that could have been avoided by reasonable efforts, he ruled that Golodetz had failed to fulfill its obligation to mitigate its losses. He specifically found that the tallow, although not in conformity with the terms of the Golodetz-Daudruy contract, was merchantable as discharged at Dunkirk. Rather than letting it age in the consignee's tanks, he reasoned, Golodetz could have sold it at the then prevailing market price for tallow of its quality. Placing this fair market value at the time of rejection at $550 per ton, the court calculated damages as the difference between $605 and $550 (contract price minus fair market value), rather than $605 and $435 (contract price minus price actually realized). Disallowing various incidental costs that would have been avoided had Golodetz resold the goods immediately, and allowing Golodetz the costs it would have incurred in connection with resale, Judge Brieant awarded damages in the amount of $183,128.

II. The Law

A. *The Shipper's Initial Burden*

Pursuant to Sections 3 and 4 of COGSA, 46 U.S.C. §§ 1303, 1304 (1982), a shipper seeking to recover from a sea carrier for damage to cargo bears the initial burden of proving that the cargo was delivered to the carrier in good condition and outturned in a damaged state. *Nissho-Iwai Co.* v. *M/T Stolt Lion*, 719 F.2d 34, 38 (2d Cir. 1983); *Vana Trading Co.* v. *S.S. Mette Skou*, 556 F.2d 100, 104 (2d Cir. 1977); *M.W. Zack Metal Co.* v. *S.S. Birmingham City*, 311 F.2d 334, 337 (2d Cir. 1961),

cert. denied, 375 U.S. 816 (1963). A plaintiff shipper is not required to prove that the carrier was at fault, or how the damage might have occurred. *Nissho-Iwai* v. *M/T Stolt Lion*, 617 F.2d 907, 912 (2d Cir. 1980). The district judge specifically found that Golodetz had offered evidence sufficient to meet its preliminary burden, and we are not prepared to characterize his finding as "clearly erroneous." *See McAllister* v. *United States*, 348 U.S. 19, 20 (1954).

The judge also found that the master of the Lake Anja, acting through a mate, accepted the special heating instructions delivered to the ship by Golodetz's agent, and accordingly the instructions became part of the contract of affreightment. Whether or not we agree with this analysis, it is clear that an action will lie for the intentional disregard of those instructions. It is not altogether clear that the carrier, by "acknowledging receipt" of the instructions, agreed to bind itself by the explicit terms of those specifications. The carrier argues strenuously that the gangplank of a ship in the process of loading cargo is a busy place; shippers' agents scurry about delivering papers to the mates, and the mates routinely sign for "receipt" of the papers. The shipowner asserts that a rule of law that binds the recipient to the terms of each paper thus received would work a terrible hardship on carriers, and would require that attorneys be strategically placed at the top of gangplanks to review documents before they are "acknowledged."

We agree that such a rule might be unworkable, and that Golodetz could have chosen more binding language than "Please acknowledge receipt by signature below," if it meant to work a modification of the contract of affreightment. We need not, however, hold that the carrier was

bound by the special heating instructions solely because it "acknowledged" the receipt of written instructions in each of three ports.

Uncontested testimony was introduced at trial establishing that instructions similar to those transmitted to the carrier have been employed in the shipping trade for many years. Tallow, after all, is a product that requires heating during shipment, and the S/S Lake Anja is equipped for precisely that purpose. An experienced carrier knowing the nature of his cargo and aware of its special heating or cooling requirements, cannot be heard to complain that the bill of lading neglected to mention those requirements. *See Gordon H. Mooney, Ltd.* v. *Farrell Lines, Inc.*, 616 F.2d 619, 620 (2d Cir. 1980). We have held that "a bill of lading will be presumed to have been issued subject to [custom]", *Encyclopaedia Brittanica, Inc.* v. *SS Hong Kong Producer*, 422 F.2d 7, 17 (2d Cir. 1979), and this rule has direct bearing on the instant appeal. Assuming the signed receipt of the heating instructions did not effect a binding modification of the contract of affreightment, we are nonetheless impelled to the conclusion that the ocean carrier was bound by those instructions in light of their longstanding use in the tallow trade.

We need spend little time reviewing the trial court's finding that the vessel's crew intentionally ignored the temperature limits, for the evidence clearly supports such a conclusion. The ship's Chief Officer, Mr. Kalve, as much as admitted that the maximum limits were ignored, as was the prescribed speed at which the tallow could be heated in preparation for its discharge. Moreover, Judge Brieant recognized that the carrier had a motive for ignoring the instructions, and in fact ignored similar heating specifica-

tions on a regular basis. The regularity with which such specifications were ignored, however, need not concern us today. It is enough to say that the carrier was bound to follow the specifications, and chose not to do so. Moreover, as a direct result of that choice, the cargo with which it was entrusted was outturned in a damaged condition.

B. *Liability of the Carrier*

The shipper having made its prima facie case, the burden shifts to the carrier to show that the cause of the damage fell within one of the COGSA exceptions set forth in 46 U.S.C. § 1304(2) (1982). *Vana Trading Co.* v. *S.S. Mette Skou*, *supra*, 556 F.2d at 105; *J. Gerber & Co.* v. *S.S. Sabine Howaldt*, 437 F.2d 580, 588 (2d Cir. 1971). The trial judge found that the collision in the English Channel fell within the catch-all exception to COGSA liability—the so-called "q clause," *see* 46 U.S.C. § 1304(2)(q) (1982), which provides that a carrier shall not be liable for any damages resulting from "any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier . . . ." Deeming the delay to be a natural incident of the collision, the judge went on to hold that the damage caused by nineteen extra days of overheating could not be charged against the vessel.

We disagree, for the cases suggest that, in this setting, the delay cannot be said to be a cause that relieves the carrier of liability for the cargo damage that occurred during the delay. Accordingly, we reverse the district court's ruling that the carrier bears no COGSA liability for such damage.

In *The Saturnia*, 226 F.2d 147 (2d Cir. 1955), an ocean carrier argued that a delay caused by a labor strike relieved it from liability for damage to cargo caused by improper ventilation during the delay. Although the strike constituted an excepted COGSA cause, *see* 46 U.S.C. § 1304(2)(j) (1982), this Court refused to absolve the carrier of liability. We held:

> The [carrier] has failed to establish that the . . . strike prevented it from providing sufficient ventilation. It has not been shown why, in spite of the delay, the cargo could not have been given the required ventilation or other steps taken to eliminate or minimize the loss.

Id. at 150. Our holding in that case made clear that the mere occurrence of an incident that would appear to fall within the list of exceptions to COGSA liability does not release the carrier from its responsibility to care for its cargo.

Accordingly, in the instant action, the carrier may not be absolved from liability resulting from overheating during the time the Lake Anja was put up for repairs at Rotterdam, notwithstanding the trial judge's findings that the delay was not unduly lengthy and that the collision was not the fault of the carrier. The judge below alluded to the fact that improper heating over the course of the expected voyage might not have resulted in damage to the tallow. In light of *The Saturnia*, however, the appropriate question becomes whether proper heating over the course of the extended voyage would have caused the cargo to exceed its contractual specifications. Absent a finding in the affirmative, we must reverse the district court's determination that the carrier was absolved of liability for damage occurring during the delay. To do

otherwise would be to release carriers from the responsibility to care for their cargoes in cases where such care is plainly possible and desirable.

C. *Allocation of Loss*

We might, on the basis of the foregoing discussion alone, reverse the district court's division of damages, for we have made it clear that the carrier properly might be charged with the loss caused by overheating the tallow while the ship was at Rotterdam for repairs. In an effort to clarify a difficult area of the law, however, we turn next to examine whether the record provides a sufficient basis upon which to allocate such damages.

For half a century, the rule regarding apportionment of damages between shipper and carrier has been that the carrier must bear the entire loss unless he can show what portion of the damages is attributable to some cause for which he is not responsible. *Schnell* v. *The Vallescura*, 293 U.S. 296, 306 (1934). Although the rule announced in *The Vallescura* predates COGSA's promulgation in 1936, it has been restated and followed in this Circuit to the present time. *See, e.g., Vana Trading, supra*, 556 F.2d at 104 & n.7; *S.S. Sabine Howaldt, supra*, 437 F.2d at 588; *Lekas & Drivas, Inc.* v. *Goulandris*, 306 F.2d 426, 431-32 (2d Cir. 1962).

The district court seems to have attempted to allocate loss by reference to degree of fault, for there was no evidence introduced regarding which tanks of tallow were damaged by time, and which by temperature. In fact, Judge Brieant found that all damages were a "function of time and temperature." Although such an attempt to connect liability to blame may, at first glance, appear to

achieve substantial justice, this approach is supported neither by the cases nor the policy considerations that buttress the seemingly harsh rule of *The Vallescura*. In *Vana Trading, supra*, 556 F.2d at 106, we did suggest at one point that apportionment of loss was inappropriate because the district court "was unable to make a finding as to the allocable percentages of the degree of *fault*" (emphasis supplied). That comment, however, must be read as something less than authoritative, for we explicitly "decline[d]" the "invitation . . . to apply to cargo suits the doctrine of proportional fault." *Id.* at 102.

A rule that requires an ascertainable apportionment of damages, as opposed to apportionment of fault, may occasionally lay at the feet of an innocent carrier a loss he could not prevent and for which he bears no blame "merely because the law, in pursuance of a wise policy, casts upon him the burden of showing facts relieving him of liability." *The Vallescura, supra*, 293 U.S. at 307. That rule, however, simply reflects an understanding of the fact that the "circumstances upon which [a bailee] may rely to relieve him[self] of [his extraordinary] duty are peculiarly within his knowledge and usually unknown to the shipper." *See id.* at 304; G. Gilmore & C. Black, *The Law of Admiralty* 162-63 (1957).

Accordingly, we hold that allocation of loss by reference to ascertainable apportionment of damages remains the rule in this Circuit. Even if the collision delay were deemed a concurrent cause of the damage to the Golodetz cargo, the total absence of evidence to support an apportionment of damages requires us to reverse the district court's allocation formula. Simply put, the carrier must bear the entire loss.

D. *Mitigation of Damages*

Finally, we turn to Judge Brieant's finding that Golodetz failed to mitigate damages, and thus could not recover the entire difference between the contract price of $605 per ton and the $435 it actually realized upon sale of the damaged tallow.

The damage rule in admiralty cases generally does not differ from ordinary contract rules. *See Internatio, Inc.* v. *M.S. Taimyr*, 602 F.2d 49, 50 (2d Cir. 1979). As in any other action for contract damages, a shipper is under a duty to mitigate his losses. *See generally Santiago* v. *Sea-Land Service, Inc.*, 366 F. Supp. 1309, 1317 (D.C.P.R. 1973). The venerable rule that requires a plaintiff to mitigate his damages has been explained by the principle that "damages which the plaintiff might have avoided with reasonable effort . . . are . . . not caused by the defendant's wrong . . . and, therefore, are not to be charged against him." 2 *Williston on Contracts* § 1353 at 274 (1962).

Judge Brieant found that the tallow, although it did not conform to the terms of the Golodetz-Daudruy contract, was nonetheless merchantable as delivered to Dunkirk. Rather than attempting to arrange for its sale, however, Golodetz allowed the tallow to congeal in the consignee's tanks, and sit for nearly eighteen months while it sought to force acceptance through arbitration. Only after this effort had failed was the tallow, by then somewhat aged and considerably less valuable, sold at a "salvage price" to Daudruy, the original consignee, without third party bids ever having been sought. The district court found, and we agree, that the ocean carrier cannot properly be charged with the tallow's diminution in value

between the moment Golodetz learned of Daudruy's rejection and the time of the eventual sale. We find that the measure of damages fixed by the district court correctly reflects the portion of the loss that may properly be charged against the carrier. We similarly affirm his rejection of Golodetz's claim for incidental expenses.

Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the cause is remanded to the district court with directions to enter judgment in favor of Golodetz and Mercator for the full amount of damages as previously calculated.

M. GOLODETZ EXPORT CORPORATION and
N. V. ALGEMENE MERCATOR,

vs. 83 Civ. 2643

SS LAKE ANJA, ETC., EUROLAKES
TANKER LINE A/S BLYSTAD SHIPPING
LINE, ARNE BLYSTAD, A/S OSLO,
BLYSTAD SHIPPING INC., STANFORD
BLYSTAD SHIPPING INC., and A/S SONGA

March 28, 1984

EXCERPT

THE COURT: I thank counsel for your assistance in the conduct of the matter. I appreciate your professional efforts and the very high level of the trial of this case. The Court now makes its findings of fact and conclusions of law as about to be stated.

The Court reserves the right to correct or modify the findings being made or adjust them for any possible mistakes and, of course, when I finish stating my findings of fact and conclusions of law I will invite either of you to make further or different requests.

The Court finds that the Court has subject matter jurisdiction under its admiralty and maritime constitutional jurisdiction and has jurisdiction of the parties. The Court finds that the plaintiffs' proposed findings No. 1, as to the status of the parties, and further finds that the defendant—may I ask you, which actual defendant owns the vessel? I thought we had a stipulation on that.

MR. LLORCA: None of the defendants do at this time.

THE COURT: I know, but at the time the case was started and the letter of indemnity was issued.

MR. LLORCA: It was A/S Songa, your Honor.

THE COURT: All right. A/S Songa was the owner at the time of the matters in suit. Thank you.

The Court finds that the plaintiff signed a uniform export contract which is in evidence for delivery of 4500 metric tons more or less of bleachable animal tallow to its customer, Daudruy Van Konberg et Fils, Dunkirk, France, which herein after is referred to as Daudruy.

That the contract which is in evidence and incorporated herein in evidence called for c.i.f. terms, delivered weight, and was subject to rejection if damaged during transit.

The Court finds that the contract contained specifications which might be regarded for convenience as relating to fancy tallow, that is to say, that they were narrower specifications as to items affecting quality, particularly with reference to free fatty acids, also known as FFA, and R & B, which was color after refining and bleaching, which were higher than those attributable to merchantable tallow traded on the international market.

Specifically, the free fatty acids were not to exceed 4 percent, with a maximum of 5 percent, rejectable if greater than 5 percent on arrival. And the R & B was not to exceed 1.5 and was rejectable if above that amount.

This particular contract of sale was not communicated to the carrier, and, of course, by its terms was not binding upon the carrier. However, I will find also that the price delivered at Dunkirk, France, was $605 per metric ton.

In accordance with and intending to comply with its obligations under the contract of sale, the plaintiff entered into a contract of affreightment with the Eurolakes Tanker Line, A/S, which is referred to hereinafter as the owner, and the parties intended thereby to bind the defendance A/S Songa, and it was executed for the Songa under the authority of Blystad Shipping Company as agents, and the validity of that contract has not been disputed and is in evidence as Exhibit 7.

The carriage was regulated by the Carriage of Goods by Sea Act as presently in effect and as in effect at the time that the cargo was shipped.

46 United States Code, Section 1300 et seq.

The Court finds further that the shipper plaintiff delivered to the vessel, to the vessel's officers, three separate heating instructions, and that these heating instructions, one of which is in evidence as Exhibit 2, contained detailed requirements as to the heating conditions of each of the three separate lots which moved on three separate bill of ladings.

The Court finds that all three of these were consigned to Daudruy in fulfillment of the contract which the plaintiff had with Daudruy, and furthermore, that the specifications or compliance with specifications on arrival could be averaged out, that is to say, it was the total of the three different parcels or the condition of the total of it which would determine whether Daudruy had the right to reject.

The Court finds that there were three deliveries of tallow from three different locations from three different sources on January 19, 20, 21, 1980, to the vessel Lake Anja, and that bills of ladings which are in evidence here were executed for the master with respect to each of those parcels. At the time of each delivery, the weight and condition of the cargo and the fact that it was within the specifications was confirmed by chemical laboratory tests.

The Court finds that these laboratory tests were made in the regular course of business prior to the commencement of any litigation and that they are the results of a regularly conducted activity, and there is no reason whatsoever to believe that the examinations made in the so-called Gulf Laboratories were other than valid and correct and accurately done. Each of the laboratory analyses made at this port of shipment shows that the goods were in compliance with the contract with Daudruy and merchantable. It is true that there is one lot which was lifted at Reserve, Louisiana, which is right on the borderline. However, as I may have observed already, under the agreement with Daudruy, it was the totality of the shipment which gave the

criteria for whether it was subject to rejection or not, rather than the analysis of a single lot. And as all people engaged in such matters know, the solution for pollution is dilution.

Be that as it may, when shipped, the totality of the three parcels was well within the specifications and the product was merchantable.

The Court finds that tallow is a natural product, the characteristics of which are well known to all parties to this lawsuit, and that the property was in good order and condition when lifted by and stowed aboard the vessel.

The Court finds that the vessel actually received a set of printed instructions, which I mentioned earlier, having to do with specific cargo care for the tallow. This provided essentially that during the voyage the temperatures maintained were to be 108 to 118 degrees Fahrenheit. Prior to discharge the temperatures could be raised from 129 degrees to 136 degrees, but must never exceed 136 degrees, and that daily temperature readings were required to be made.

The Court finds that these instructions were actually delivered to and acknowledged by the master of the vessel, and the Court concludes as a matter of law that these heating instructions became a part of the contract of affreightment by which the defendant was bound.

The Court finds that the officers willfully and intentionally evaded the heating instructions, that they did so intentionally for reasons of their own, that the practice of doing so was quite common and well known to the owners and to those engaged in the carriage of tallow by sea.

The Court finds that the vessel set sail on January 24th and was due to arrive February 8, 1980. On February 7. 1980, a collision occurred in the English Channel with another vessel, the Maryios City, and the Court finds that the collision doubled the length of the voyage time by adding 19 days in Rotterdam due to the repairs.

The court finds that these 19 days were not excessive. We have testimony by the mate that people were at work on the

vessel at all times. There is a presumption of regularity in such matters, and certainly not in the interest of the shipowner to have to have his vessel off charter or not earning freights for a day longer than necessary.

And the Court believes that the 19 days, the 19 lay days at Rotterdam were necessary and due to repairs and the repairs were made with reasonable expedition. The vessel discharged the Rotterdam cargo in perfectly good order with no difficulty on February 26th — I'm sorry, beginning at February 8th.

The Court finds that it was reasonable and proper to take the injured vessel, the damaged vessel, to the port of Rotterdam, notwithstanding that Dunkirk might have been nearer.

The Court finds further that on February 26, 1980, the vessel discharged the rest of the tallow at Dunkirk. The discharge was about 33 metric tons short. This is not relevant to the Court's view of this case. Some of it may have been due to clingage. There is no evidence that any of the tallow was lost as a result of the collision which occurred on the port side of the vessel, where these particular parcels were not being carried.

The consignee, Daudruy, caused analyses to be made and rejected the cargo as being off specification. Apparently it may be inferred from the record that Daudruy is the principal, if not the only regular consignee of tallow of Dunkirk, and these parcels were being pumped off into Daudruy's tank. Samples were sent to laboratories for analyses and the condition of the tallow was that it was merchantable but it was not in compliance with the contract. And the reason that it was not was that the free fatty acids had increased slightly, though it may well be that in an averaging of the three different lots that element would be in compliance. But it was also quite clear that the R & B measurements were in excess of the amount permitted by contract, and that these gave Daudruy the basis to reject the shipment as being not in compliance with the contracts between Daudruy and the shipper. Once this rejection took place, it was, in my view, the obligation of the shipper to take immediate steps to mitigate its damages, and that sufficient steps would have included an immediate sale of the tallow.

The Court finds that the tallow was salable and could have been sold at that time. Instead, it was allowed to remain for a lengthy period in Daudray's tanks in a congealed form where other buyers could not inspect it for purposes of bidding on it. And an arbitration was conducted in France. The plaintiff was entirely within its rights to conduct the arbitration in France, but I regard that as irrelevant to the issues presently before this Court. The plaintiff was unsuccessful in obtaining relief from the arbitrators to compel Daudruy to accept the shipment. The arbitration was a proceeding to which the carrier was not a party. The carrier was not bound by the results of the arbitration, but it is the fact that the arbitration found that the product was not within the rather narrow limits for fancy tallow which had been set forth in the agreement between the consignee and the shipper. Thereafter, following a lengthy period of time, after storage charges had accrued, the plaintiff sold the tallow at what may be characterized as a salvage price of $435 per metric ton to the same purchaser, Daudruy, which had successfully resisted the arbitration.

The Court understands that Daudruy is a soap and detergent manufacturer and believes that the purchase was made for the purpose of using it commercially in the manufacture of the products of Daudruy's plant at Dunkirk.

The Court finds that the Carriage of Goods by Sea Act is applicable herein by its own strength and also as incorporated in the bill of lading and in the contract of affreigtment and that the consignee or shipper seeking to recover against a carrier for damage to the shipped goods must prove initially that the goods were delivered to carrier in good condition and later must prove out-turn by the carrier in a damaged condition.

The Court finds that the plaintiffs have met this burden. The issuance of the clean bills of lading as to a product such as tallow extends only to matters which would be visibly ascertainable in the course of delivery to the vessel. However, the three separate laboratory analyses in the so-called Gulf Laboratories, showed that the tallow, all three parcels, were in conformity, chemically, in accordance with the export contract, with the possible exception of the Reserve Louisiana parcel,

which had already reached a 4.0 FFA, but as I pointed out earlier, the totality of the cargo was well within limits and the seller was permitted to average the different lots. There has been some discussion about the so-called FOFSA laboratory reports. Based on the testimony of Dr. Milton, who cannot explain the situation shown by those reports and finds an inconsistency in them, and considering also the fact that these laboratory reports cannot be reconciled with the reports made in Louisiana before any issue had arisen in the matter under the regular course of business, the Court declines to find based on the FOSFA lab reports or any other information in the case, that the tallow was already off spec upon shipment or that it had any inherent vice of the sort for which the carrier is not liable. these test were made from samples which had been reserved in tin cans in the living quarters of the ship's officers on the vessel and there was a distinct lapse of time and the Court does not believe, based on what is presently before me, the FOSFA reports, which are regarded by Dr. Milton as somewhat unusual, in that the relationship which should have been espected to exist between the free fatty acids and the R & B was not present and does not believe that these particular reports are entitled to very much weight in the trial and paricularly does not believe that they rebut the evidence of good condition on delivery to the carrier, which is derived from the so-called Gulf reports.

The plaintiff has also demonstrated that the out-turn at Dunkirk showed a damaged condition or at least a deteriorated condition. The laboratory reports available show that both the free fatty acids and the R & B were significantly in excess of what they had been before the voyage began, and also in excess of specifications.

To return to the question of the heating, the Court finds that on this vessel the tallow was heated by steam coils located near the bottom of the respective tanks. This steam is provided by an auxiliary boiler on the vessel which does not propel the ship's engines, which are diesel, but it does provide the heat to the crew's quarters and any other steam which may be incidentally necessary to the operation of the vessel. There are many reasons which impel ship's officers to maintain a high level

of heat in the tanks of tallow. One of these reasons, of course, is that stripping the tanks proceeds much more quickly and effectively if the tallow is at a higher temperature, which, in turn, gives it a lower viscosity.

The Court finds that there are no circulating devices in the tank and, therefore, there will be a 5 or 6 degree differential in temperature between the tallow in the center of the tank, right above the heating coils, and the tallow which will be out at the edge of the tank near where the plates are, which in turn are against cold river water at this time of the year.

The Court does not believe that would be significant congealing during carriage but the movement of the vessel and the convection of the tallow should keep it from congealing in any great thickness on the side of the tanks. However, during this discharge, there is a significant problem of possible clingage which is greater depending on the greater viscosity of the product, the same as fuel oil or anything else that is carried in a tanker, and also in places in the tank which are remote from the steam coils it is possible for congealing to take place.

Temperature requirements recognize this, because they permit a much higher temperature during discharge then that maintained while at sea. The temperatures are only taken twice during the day and averaged out. It's surprising that may of the entries are written in at 136, but there are many that are above it.

The Court believes that there is an element of suspicion in some of these numbers which are written down, but even taking them at their face, the columns, during the testimony of the Chief Officer, Mr. Kalve, show that temperatures significantly in excess of the maximums provided for in the instructions were maintained.

The vessel had a motivation to do so and apparently does so regularly in the carriage of tallow, but this case was complicated by the fact that this tallow was being shipped on narrow specifications, and also by the extra delay at Rotterdam due to the collision at sea. The vessel's having accepted heating instructions and making them part of the contract of affreightment, is in breach of its contract of carriage when it

intentionally deviates from those instructions. The vessel should have either rejected the instructions and advised the shipper that they would heat the cargo in accordance with their own views of what was most practical or, having accepted the instructions, should have made a good faith effort to comply with it.

This is not merely a case of a mistake by officers or men of the ship. This is sufficiently commonplace and frequent, particularly during the winter so that knowledge thereof must be imputed to the owners, that the officers were in the habit of disregarding heating instructions. The Court finds that the damage sustained by the tallow was caused in part by the intentional breach on the part of the master and crew of the heating instructions which was committed with privity of the owners.

The Court finds that tallow is a natural product and that is has characteristics of ongoing chemical reactions internally, which is typical of any such natural product, that these reactions adversely affect the quality of the product and that all of these reactions, which increase the free fatty acids or which increase the R & B figure for the tallow are essentially a product of heat together with time, and that the damage which occurred is a function of heat plus time.

The Court concludes that overheating was a concurrent cause which seriously increased the deterioration of the tallow during the voyage.

The Court also finds that the collision which lengthened by 19 days or approximately a hundred percent the expected length of the voyage in turn increased the exposure of the tallow to deteriorations by the same percentage. That is to say, the heating time to which it was subjected was doubled. These are concurring causes because I am convinced that the overheating alone, as the experience of these mariners has shown, would ordinarily not in a short sea voyage cause the tallow to deteriorate so badly as to be non-merchantable or be below specifications even for fancy tallow. But when the delay is cranked into it and it must be observed that knowing of the delay and knowing of the fact that the ship would be held for repairs,

those charged with the management of the vessel did not diminish the amount of steam they were sending into the tanks. I might note that these tanks are not regulated by any kind of thermocouple or any device of a mechanical nature, but the steam instead was regulated by valves, both on the inlet and on the outlet by which the condensate returns to the boiler. And this type of regulation has a great opportunity for human error and does not lend itself to frequent changes in the heating condition.

The Court notes also that the heating instructions call for gradual changes in temperature, and that at no time during the period of 24 hours must the increase of the cargo exceed five degrees fahrenheit. That is item 5 of the instructions. To digress slightly, I might note that in the shore-based banks it is generally common, including the one at Harvey where the tallow was increased something like 70 degrees over a two-day period, it is more common to have a circulator in the tank or a heat exchanger, or both. Here in this case the heating is purely by convection from serpentine coils which are laid in the bottom or near the bottom of the tanks. The live steam is likely to be 212 degrees fahrenheit or more, depending on the pressure. We were not told, as I recall it in the trial record, what the working pressure of the auxiliary boiler is. Having in mind the length of the vessel and the size, it would have to be a significant steam pressure to get the steam out to all the tanks.

The Court finds that the collision which was caused as a result of the negligence of those navigating the Maryios City in the English Channel, is a concurrent cause of damage as to which the owners are exornerated from any burden by reason of Section 1304, sub-paragraph 2 (9) which exempts the carrier from any liability for damages caused without the fault or negligence or of agents or servants of the carrier. Even if it were assumed that this vessel were at fault in the collision, which is hard to see because the vessel was hit on her port side in a crossing situation, the damages would still be limited under COGSA as due to the negligence of the navigation with respect to which the owners have no privity or participation.

The Court, accordingly, concludes that there were concurrent causes of the loss in this case.

The Court is not concerned about the lengthy arguments which have been made about the burden of proof because the Court believes that once there is sufficient evidence to make a conclusion or a finding of fact more likely than unlikely in a civil case that discharges the burden of proof. The Court must then look at the totality of the evidence.

The defendants have come forward and proved the fact of the collision from their log and they proved the lay days and the Court has heard testimony that those days were reasonable because people were working on the vessel at all times, in addition to which the activities of all the parties are viewed in the light of the presumption in favor of regularity, property, and correct dealing. So the Court, accordingly, finds that there were two concurrent causes of the loss, one being the overheating and the other being the delay due to the collision, and finds ample support in the record for determination that the cargo damage is allocable between the delay due to the collision for which the carrier is exempted from any liability, and the overheating for which it is not.

The Court considers the question of the chain of custody on the sample in the Louisiana port. I don't think that is a significant issue. The Court declines to find that the cargo was borderline cargo. A shipper who gives specific instructions as to the care of cargo, as was done in this case, may recover for any depreciation to the cargo caused by a willful breach of those instructions as to the carriage of the cargo or its ventilation or its heating, without regard to the fact that the shipper also has private agreements with the consignee which allow the consignee to reject cargo which is still merchantable, but which has depreciated slightly during the carriage and, therefore, does not meet the specific contract specifications.

The Court then turns to the question of damage. As I noted earlier, a shipper or consignee asserting a claim for cargo damage has a duty to mitigate damages and may not recover any damages which could have been avoided by reasonable efforts. And the Court finds that the plaintiff did not completely fulfull that obligation. Specifically, the Court finds that the plaintiff should have sold the cargo prior to litigating or arbitrating in

France and should have done so as soon as possible upon finding that the consignee was rejecting the goods. It would have still been possible for the shipper to have arbitrated with the consigneed for the difference in price and obtained a damage award. Accordingly, the storage charges incurred by the plaintiff are totally disallowed as an item of damage. The plaintiff actually sold the tallow to Daudray for $435 a metric tone at a time when it was in a congealed condition in a tank. This in effect allowed the same consignee, whom the shipper claimed to have breached its duties under the contract, pursuant to which an arbitration was held, to buy tallow which was merchantable but not up to contract specification and to do so at an extremely bargain price. The Court does not believe that the defendent is bound by that, and that the price received is not the basis for determining the damages here.

The Court finds that merchantable tallow at a value at the time and place of delivery of $550 per metric ton, being the Rotterdam price, together with $10 for barging to Dunkirk, so that the price which should have been obtained in mitigation of damages and the value of the cargo at discharge would be measured by that, less a 5 percent diminution which should be allowed under the animal tallow export contract agreement adopted by the rules of the American Fat and Oils Association for animal tallow and grease, which is Exhibit H in evidence. So the Court finds, accordingly, that at the time of breach by Daudruy or at the time of breach by the carrier which allowed Daudruy to reject the cargo, that the plaintiff is entitled to recover the difference between $533, which the Court finds to be the fair value, of $550 less 5 percent for diminution and $10 for barging, and that the contract price was $605. These figures multiplied by 4,529 metric tons which were shipped produced a total amount of $330,617. The plaintiff is also entitled to treat as an item of damages the analysis fees in France of $837. This makes a total of $331,454. The Court believes and finds that of the amount $165,727 is attributable to the time aspect of the breach as to which the defendants are exempted because it was due to the collision, perils of the sea, and therefore, the plaintiff should recover the balance, that is the sum of $165,727.

The Court finds that the plaintiff should receive prejudgment interest at the rate of 10.5 percent from the date the action was filed.

The Court is using the prime rate of April 1983. the action was filed April 6, 1983. There was undue delay in bringing the action and the Court also believes that there was some delay in placing it in a status where it was marked ready for trial. The Court does not believe that the carrier should be held for liability for interest for the time that was being consumed by the tallow being in storage with Daudruy or by arbitrating with Daudruy or by other matters for which the defendant is not responsible.

The Court is not called upon to adjudicate any issues between two plaintiffs, and does not comment on the status of the insurer as having paid part of the claim. The Court notes that temperatures in the tank were recorded to be as high as 136 degrees at Rotterdam, 145 degrees at Dunkirk, even if it be assumed that the temperature readings were reliable, which I think is also subject to serious question.

The Court will now entertain any specific requests to make additional or further or different findings which the Court has not already touched upon.

Mr. Mazaroli, is there anything else in particular that you would like to bring out at this point?

MR MAZAROLI: Yes, your Honor. The arbitration was held in New York. it was not held in France. It was during the first third of your Honor's findings.

MR. COURT: All right. The findings may be deemed amended accordingly. That is my mistake.

MR. MAZAROLI: I'm not certain I understand the basis of the—prior to allocation, the basis of the damage claim. That is, is your Honor finding that the sound market value was $533?

THE COURT: $523 plus $10 lighterage which increases the utility of Rotterdam tallow present in Dunkirk.

There is testimony it would be about $10 a ton to ship it. A person in Dunkirk wanting to buy tallow would get it on the Rotterdam spot market and pay $10 barging.

MR. MAZAROLI: If that is the sound market value, we are deducting that from the contract price.

MR. COURT: Yes.

MR. MAZAROLI: I'm not sure I understand the basis for doing that. If the cargo were discharged—

THE COURT: No, that is what you should have gotten for it. The contract price is 605. In mitigation of damages I am finding a market value of $550 plus $10 and a 5 percent diminution under the rules of oils and fats, which is Exhibit H, the oils and fat rules, page 9. Because it did have too much R & B.

MR. MAZAROLI: Your Honor, it's completely rejectable under those rules about 1.5.

THE COURT: I don't think that is so in this particular case as to these goods. I think the totality of all the shipments was still merchantable in Dunkirk.

Anything else? Mr. DeOrchis?

MR. DE ORCHIS: My main trouble with the case, your Honor, is the business of the tank at the port of loading. I think your Honor found that these shore tanks usually have circulators or—there is another word you used —

THE COURT: Heat exchangers.

MR. DE ORCHIS: Heat exchangers. The inference being that if you had circulators you could heat it up quickly with much less damage than you would if you were merely relying on convection. Just the same as a cook stirs the pot. I understand that. But there is no evidence of that whatsoever.

THE COURT: My recollection is that there is.

MR. DE ORCHIS: He said that they have some controlled heating.

THE COURT: I think he also testified to circulators. I will stand by the record on the one, but I'm sure I heard such testimony.

Is that all?

MR. MAZAROLI: Yes, your Honor.

THE COURT: Thank you very much.

The Court directs the clerk to enter judgment for the plaintiff in the total amount of $183,128 inclusive of prejudgment interest with costs to be taxed.

(Time noted: 3:50 p.m.)

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CLERK

No. 84-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S/S "LAKE ANJA", her engines, tackle, boilers, etc., EUROLAKES TANKER LINE, A/S BLYSTAD SHIPPING LINE, ARNE BLYSTAD, A/S OSLO, BLYSTAD SHIPPING INC., STANFORD BLYSTAD SHIPPING, INC., OSLO & A/S SONGA,

Petitioners,

—against—

M. GOLODETZ EXPORT CORPORATION and N.V. ALGEMENE VERZEKERINGSMIJ MERCATOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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COMMENT ON PETITIONER'S STATEMENT OF THE CASE AND ARGUMENT

The Court of Appeals did not base its holding on *Schnell v. The Vallescura*, 293 U.S. 296 (1934). Rather, the Second Circuit held the ocean carrier liable for all of the cargo damage because petitioner did not prove it was entitled to a defense under Section 1304 (2) of the United States Carriage of Goods by Sea Act, 46 U.S.C. 1300 *et. seq.* The decision was based on *The Saturnia*, 226 F.2d 147 (2d Cir. 1955), which stands for the irrefutable principle that a common carrier has a continuing duty to care for cargo in its custody. The comment regarding

Schnell v. The Vallescura was only dictum. Thus, the petitioner raises a moot issue, at the wrong time and in the wrong place, and the attempt to obtain review on certiorari is merely an academic exercise. It is of no consequence to the legal basis for the decision below or the quantum of damages awarded.

The quarrel petitioner seems to have with the Court of Appeals has to do with its holding that the ocean carrier may not be absolved for damage resulting from the overheating of the cargo during the Rotterdam repair delay (A-16). Although the trial judge speculated that improper heating over the course of the expected voyage might not have resulted in damage to the tallow, the Court of Appeals put the issue in proper focus:

> We disagree, for the cases suggest that, in this setting, the delay cannot be said to be a cause that relieves the carrier of liability for the cargo damage that occurred during the delay. Accordingly, we reverse the district court's ruling that the carrier bears no COGSA liability for such damage. (A-15)
>
> * * *
>
> In light of *The Saturnia*, however, the appropriate question becomes whether proper heating over the course of the extended voyage would have caused the cargo to exceed its contractual specifications. Absent a finding in the affirmative, we must reverse the district court's determination that the carrier was absolved of liability for damage occurring during the delay. (A-16)

The petitioner mistakenly attempts to camouflage this holding as revolving around the question of the method of apportionment of liability by the trial judge. That is false! At that point of its decision, the Court of Appeals had not even mentioned *Schnell v. The Vallescura*. Rather, Judge Kaufman specifically based the ruling on *The Saturnia* and stated: "We might, on the basis of the foregoing discussion alone, reverse the district court's division of damages." (A-17) That is, since delay was not an excepted cause, the apportionment of the damage was not an issue.

Moreover, by sophistry petitioner seeks to give the impression that the ocean carrier was merely a victim of circumstance, an innocent bystander, if you will. The trial record belies this. In the first place, both the trial court and the Court of Appeals found the petitioner to be a willful, intentional wrongdoer. (A-14, A-11) Petitioner, with knowledge, deliberately violated the heating instructions which were in fact a custom in the trade. Secondly, petitioner's feigned plea of ignorance as to the chemistry of tallow is a sly ploy, both factually and legally. The petitioner had transported tallow for many years. The S/S Lake Anja was built in 1963 and was equipped precisely for the purpose of carrying tallow. As noted by Judge Kaufman, petitioner was an "experienced carrier knowing the nature of his cargo and aware of its special heating and cooling requirements..." (A-14)

Petitioner also desperately attempts to portray its position as a *cause celebre*, or a crusade in which it is the bellwether for worldwide ocean carriers. In actuality, this is a situation of failure of proof by the petitioner at the trial court level. Counsel for petitioner, who was also trial counsel and not merely a casual spectator, did not even argue at any stage of the district court proceedings that the cargo damage could or should be apportioned. Before the Court of Appeals, the petitioner failed to set forth any plausible evidentiary or legal formula to apportion the damage, whether on the basis of fault or extent of damage. Furthermore, petitioner offered no proof as to the relationship between heat and time and their effect on tallow. Were they directly proportional? Inversely proportional? Equal? Disparate? No one testified that such questions could not be answered. There was also no proof that without overheating the tallow would nevertheless have arrived damaged, or that the specific time period in question, i.e., the 19-day delay, would have alone caused damage. Petitioner, in essence, tries to use the lapses of the ocean carrier's trial counsel to contrive equity arguments in its favor.

For the record, there was no "battery of experts". Petitioner called one expert to testify, whom the trial judge did not believe.

The other witnesses for both sides were fact witnesses employed in the trade.

Finally, petitioner's references at page 7 to an "off the record" conference with the trial judge is a breach of conduct which should not go unnoticed. Respondents' counsel's recollection of the *in camera* conference is different. In any event, none of this is a part of the trial record. It is merely another gratuitous comment on the part of petitioner herein.

THE WRIT OF CERTIORARI SHOULD BE DENIED FOR THE FOLLOWING REASONS:

1. THE FATAL FLAW IS THAT THE QUESTION RAISED BY PETITIONER DOES NOT QUALIFY FOR REVIEW. THIS COURT RECENTLY DENIED CERTIORARI ON THE SAME ISSUE.

Petitioner's arguments raise no issue which could qualify for review under Rule 17.1 of this Court.

There is no conflict with any other circuit involved herein. In fact, the Second Circuit's analysis of the issue raised by petitioner is in accord with the other circuits with respect to allocation of damages in cargo cases. No federal question has been decided in conflict with a state court of last resort, and there has been no departure from the usual course of judicial proceedings.

Most significantly, this is not a situation where a Court of Appeals has decided an issue which is ripe for review by this Court or is in conflict with other decisions by this Court. In fact, the Second Circuit's analysis with respect to the issue raised by petitioner follows this Court's directives in *Schnell v. The Vallescura*. It is also the very same issue which this Court so recently refused to review in *Vana Trading Co., Inc. v. S/S Mette Skou*, 556 F.2d 100, *cert. denied*, 434 U.S. 892 (1977).

Furthermore, in view of the Court of Appeals' primary holding that in any event the ocean carrier was liable for all of the cargo damage because a COGSA exception was not

available, petitioner's argument is moot. The result below as to either liability or the quantum of damages would not be altered even if certiorari were granted, since the petitioner seeks review of dictum.

2. THE SECOND CIRCUIT CORRECTLY INTERPRETED *THE VALLESCURA RULE* – A RULE BASED ON SOUND POLICY CONSIDERATIONS WHICH HAS BEEN UNIFORMLY APPLIED BY THE OTHER CIRCUITS.

In any event, the Court of Appeals did not misread *Schnell v. The Vallescura* as is suggested by petitioner. Rather, the Second Circuit correctly explained the directives of this Court.

In *The Vallescura, supra*, 293 U.S. at 304, Justice Stone characterized a common carrier of goods by sea as follows:

> He is a bailee entrusted with the shipper's goods with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.

Relying on such policy considerations this Court promulgated the durable and just rule that a common carrier must bear the entire loss unless he can prove what portion of the cargo damage is attributable to some cause for which it is not responsible:

> The vessel in the present case is in no better position because, upon the evidence, it appears that some of the damage, in an amount not ascertainable, is due to sea peril. That does not remove the burden of showing facts relieving it from liability. If it remains liable for the whole amount of the damage because it is unable to show that sea peril was a cause of the loss, it must equally remain so if it cannot show what part of the loss is due to that cause.

Schnell v. The Vallescura, 293 U.S. at 307.

As conceded by petitioner, this is the "long established common law rule." (p. 6) In dictum, the Second Circuit correctly interpreted this rule:

> Even if the collision delay were deemed a concurrent cause of the damage to the Golodetz cargo, the total absence of evidence to support an apportionment of damages requires us to reverse the district court's allocation formula. Simply put, the carrier must bear the entire loss. (A-18)

The rule as set forth herein is identical to the rule which has been applied historically in the Second Circuit, and in the other circuits, in the very limited number of cases in which the issue of apportionment of cargo damage has arisen.

As explained in *Vana Trading v. S/S Mette Skou*, 556 F. 2d 100, 104 & n.7 (2nd Cir. 1977) *cert. denied* 434 U.S. 892 (1977) there have been seven cases wherein *The Vallescura* rule, as applied herein, has been "restated and followed" in the Second Circuit since 1934. It has also been invariably followed in the other maritime circuits. *Daido Line v. Thomas P. Gonzales Corp.*, 299 F. 2d 669, 671 (9th Cir. 1962). *Tri-Valley Packing Ass'n v. States Marine Corp.*, 310 F. 2d 891, 893 (9th Cir. 1962), *The Oregon Mail*, 270 F.2d 499, 502 (9th Cir. 1959), *U.S.A. v. Apex Fish Co.*, 177 F. 2d 364, 368-369 (9th Cir. 1949), *U.S. v. Los Angeles Soap*, 83 F. 2d 875, 882 (9th Cir. 1936); *The Nelson Traveller*, 95 F. 2d 286 (9th Cir. 1938); *Northeast Petroleum v. Kyriakouw Shipping Co. Ltd.*, 478 F. Supp. 558, 563 (D.C. Mass. 1979), *The Quaker Oats Co. v. M/V Torvanger*, 734 F. 2d 238, 241 (5th Cir. 1984); *Blasser Bros. v. Northern Pan-American Line*, 628 F.2d 376, 382 (5th Cir. 1980). *Nitram v. Cretan Life*, 599 F. 2d 1359, 1373 (5th Cir. 1979), *Swedish American Lines v. Evans Products Co.*, 431 F. 2d 869, 870 (4th Cir. 1970). *PPG Industries v. Ashland Oil Co.*, 592 F. 2d 138, 144 (3rd Circuit 1978), *cert denied* 444 U.S. 830.

None of the circuits has deviated from *The Vallescura* rule when the issue of allocation of cargo damage has arisen in similar settings. In fact, the petitioner has failed to cite a single decision wherein a circuit court, in a situation analogous to the instant action, has either chosen not to adopt *The Vallescura* rule or has determined that it should be replaced by, or interpreted to include, an alternative doctrine such as proportionate fault.

Furthermore, a survey of the reported jurisprudence appears to indicate that in the course of the 50 years during which it has existed, the circuit courts have apparently had occasion to cite or follow *The Vallescura* rule in about 25 cases. In only 10 of these cases was the rule the deciding factor upon which the court held the carrier liable for all of the cargo damage. In the remaining cases it was merely discussed in dictum explaining the overall burdens of proof which the courts have universally applied in cargo cases.

Thus, the rule set forth in *Schnell v. The Vallescura* that the carrier has the burden of proof to segregate the cargo *damage* resulting from excepted and non-excepted causes is not only an equitable rule, it is also a norm which induces amicable resolution of cargo disputes. This is obviously true since the issue of apportionment of cargo damage has rarely reached the circuit courts. *The Vallescura* rule, as correctly interpreted herein by the Second Circuit, functions effectively, and as the old saying goes, "If it ain't broke, don't fix it."

3. THE INTERNATIONALLY FOLLOWED RULE OF *THE VALLESCURA* DOES NOT DISRUPT "UNIFORMITY" OF MARITIME LAW. PROPORTIONATE FAULT IS APPLIED ONLY IN NEGLIGENCE AREAS OF PERSONAL INJURY AND COLLISION. OTHER AREAS OF MARITIME LAW ARE NOT SO GOVERNED.

A cargo claim is not a negligence case. It is a contract case based on the terms of the contract of affreightment, or the bill

of lading, booking note, and other writings such as heating instructions, as modified by COGSA. Cargo claims litigation is intertwined with marine insurance contracts, liability insurance contracts of ocean carriers, and protection and indemnity policies of shipowners, charter parties and so on. Most carrier offenses are breaches of contract although certain defenses may involve considerations of due care. Herein, the offense of the petitioner was an intentional, willful breach of the contract of carriage.

Furthermore, in a cargo case, the roles of the parties are significantly different from the roles of the respective parties in collision cases and in personal injury cases, where both parties were actors who participated in the incident out of which the litigation arose, and both have access to the sources of proof.

A cargo situation, on the other hand, involves a bailment relationship. The shipper entrusts his cargo to the ocean carrier who has exclusive custody of it during the entire ocean voyage and extended transportation period. The plaintiff shipper or consignee is not present when the cause of action which gives rise to the cargo claim is initiated and does not have the same access to the sources of proof which are available to the ocean carrier. This is why *The Vallescura* the rule was created, and this is the reason all of the courts have through the years asserted that it is based on a "wise policy" which serves not only to hold carriers accountable for cargo damage, but to induce carriers to exercise utmost care in discharging the duty which is peculiarly within their control.

This is not a situation such as existed in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), wherein the collision damages rule in the United States was out of harmony with the other maritime nations. Rather, the essence of *The Vallescura* rule, as analyzed by the Second Circuit herein, is accepted and applied by courts of the major maritime nations, See Carver, *Carriage of Goods by Sea*, Vol. 1, Sec. 154, p. 132 (12th ed. 1971). It is also incorporated in the United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules")

promulgated in 1978, but not yet in force pending ratification by the requisite number of countries. Article 5.7 of the convention is as follows:

> 7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, *provided that the carrier proves the amount of loss, damage* or delay in delivery not attributable thereto. (emphasis added)

One commentator cited *The Vallescura* in evaluating this article of the convention as "incorporat[ing] U.S. case law, which requires the carrier to separate *damage* for which it is not liable from *damage* for which it is liable, or else, pay the entire damage." Chandler, *A Comparison of "COGSA", the Hague/Visby Rules, and the Hamburg Rules*, 15 Journal of Maritime Law & Commerce, 233, 243-245, (1984).

Petitioner's myopic contention that *The Vallescura* rule should only apply to pre-COGSA cases is without merit. *The Vallescura* was decided in 1934. The U.S. Carriage of Goods by Sea Act was enacted in 1936, after extensive committee hearings. Congress certainly must have known of the case and saw no reason to statutorily alter *The Vallescura* burdens of proof which, as conceded by petitioner, is based on a "long established common law rule." (p. 6)

Moreover, at the present time Congress is considering a draft of a bill which codifies *The Vallescura* burdens of proof. The Committee on Merchant Marine and Fisheries of the U.S. House of Representatives in a letter dated January 16, 1985, has circulated to all interested parties a proposed draft of a bill "To revise, consolidate and enact certain laws related to maritime liability as subtitles I and III of title 46, United States Code, 'Shipping'." The letter was circulated by the Honorable Walter B. Jones, Chairman of that committee. In Subchapter II - Duties and Liabilities, Section 30911, article (3) reads, as now drafted:

> (e) When loss, damage, or delay is because of the fault or neglect of a carrier or the carrier's agents or servants and another person, the carrier is liable only for the extent of the loss, damage, or delay attributable to the fault or negligence of the carrier or the carrier's agents or servants *if the carrier proves the amount of loss, damage, or delay attributable to the other.* (emphasis added)

While the language seems slightly askew it is clear the Committee intends to codify the gravamen of *The Vallescura* rule and of the *Hamburg Rules*. A proposal is now before the committee to enact the bill with the proviso it take full force and effect once the majority of the United States' trading partners by dollar amount adopt the *Hamburg Rules*.

Certainly, the worldwide trend is to accept the thrust of *The Vallescura* rule rather than abandon it as petitioner proposes. There is at present uniformity in the national and international maritime law as it relates to the allocation of liability when there are concurring causes of cargo damage. No purpose will be served by tampering unnecessarily with this worldwide legal harmony.

THE CONCLUSION

It is not clear whether the petitioner wants this court to somehow reinterpret *The Vallescura* rule to allow for division of cargo damages based on proportionate fault, or whether petitioner wants the court to replace the venerable *Vallescura* rule with such a formula. To take either step would be completely contrary to the norms applied by the circuit courts and tacitly adopted by this court when it denied certiorari in *Vana Trading Co. Inc. vs. S/S Mette Skou*. It would also be out of tune with the international maritime world which follows the spirit of the burdens of proof rule as enunciated by this court in *The Vallescura*.

In any event, this is not the case to consider the relief suggested by the petitioner and the petition for review on certiorari should be denied.

Respectfully submitted,

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